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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DERRICK WASHINGTON, Defendant and Appellant.	B209785 (Los Angeles County Super. Ct. No. TA091297)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur M. Lew, Judge. Affirmed.

Richard C. Neuhoff, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael R. Johnsen and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Derrick Washington of first degree murder (Pen. Code, § 187, subd. (a)),[1] and found true allegations that he personally used a firearm (§ 12022.53, subds. (b), (c) & (d)) and that he committed the crime for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).[2] The trial court sentenced him to a total term of 50 years to life in state prison. He appeals from the judgment of conviction, contending that the trial court erred by: (1) admitting portions of a police interview of his sister, Angela Washington, that were not inconsistent with her trial testimony; (2) refusing to instruct that prior threatening behavior could be considered in connection with self-defense and imperfect self-defense; (3) instructing that gang membership could be considered in judging witness credibility; and (4) giving internally inconsistent instructions on self-defense. We affirm the judgment.

BACKGROUND

On June 14, 2007, after the graduation ceremony at Centennial High School in Compton, defendant shot and killed Dovon Harris, a Centennial student. At trial, defendant, who was 16 years old at the time of the killing and also attended Centennial, did not dispute being the shooter. Rather, he argued theories of self-defense and unreasonable self-defense, and contended that Harris was an unintended victim.

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[1] All undesignated section references are to the Penal Code.

[2] The jury also found true certain allegations pursuant to Welfare and Institutions Code section 707: that defendant was at least 14 years old (subd. (d)(2)(a)), that he was at least 16 years old (subd. (d)(1)), and that he was at least 14 years old and committed the crime for the benefit of a criminal street gang (subd. (d)(2)(c)(ii)).

I. *The Murder*

On the afternoon of the shooting, Ishanitte Jones and several friends attended graduation ceremonies at Centennial High School, where she was a student. Leaving the campus, one of Ishanitte's friends, Donshay, became embroiled in an argument with two other girls: Angela Washington, defendant's 17-year-old sister, and Angela's friend, Lakeisha. Angela challenged Donshay to a fight in the middle of Central Avenue.

Ishanitte and her friends walked to a nearby bus stop at El Segundo Boulevard and Central Avenue to wait for the bus, intending to return home to the Nickerson Gardens area. A group of nine or ten male teenagers joined them at the bus stop. Several members of the group were affiliated with the Bounty Hunters gang from Nickerson Gardens. Dovon Harris, known as Poo-Poo, was with the group, but he had no gang affiliation. At the Golden Bird restaurant across the street from the bus stop was a group of boys from the West Side Piru gang.

Some of the boys at the bus stop said "Nickerson Gardens" and "Bounty Hunters." In response, West Side Piru members said that they could "take it to" Enterprise Park.

Ishanitte and the others at the bus stop took the bus to Central and 114th Street, where they exited and walked on 114th Street toward Nickerson Gardens. Most of the boys walked ahead, while the girls and some of the boys, including Dovon Harris, walked behind.

As she was walking, Ishanitte saw a Tahoe (which she had earlier seen at the Golden Bird restaurant) come to a screeching halt on 114th Street. She saw defendant, whom she knew as "Deuce" from seeing him on prior occasions at Centennial High School, seated in the front passenger seat. Defendant pointed a

gun at Ishanitte's group and fired eight or nine shots. Dovon Harris was struck by a single bullet in the head and died.

II. *The Interrogations*

On June 20, 2007, six days after the killing, Los Angeles Police Detectives John Skaggs and Nathan Kouri arrested defendant and his sister Angela at their grandmother's house and transported them to the police station. The detectives first questioned Angela separately, then permitted her to speak to defendant alone. They then questioned defendant separately, after which they allowed defendant to speak to Angela and his aunts. The questioning of Angela and defendant, and their brief conversation together, were video recorded and played for the jury. The conversation with the aunts was audio recorded and also played for the jury.

A. *Angela's Interrogation*

Under questioning conducted primarily by Detective Skaggs, Angela said that on the afternoon of the shooting, after the graduation ceremony at Centennial High School, Angela and a friend, Lakeisha, argued with a girl from Nickerson Gardens named Donshay.

At the bus stop on one side of the street were members of the Bounty Hunters gang from Nickerson Gardens. Across the street, at the Golden Bird restaurant, were members of the West Side Piru gang, from the area where Angela lived. Lakeisha was from West Side Piru. Angela was not a West Side Piru member, but she was "over there" with the gang.

Lakeisha walked into the middle of the street. The Bounty Hunters began taking off their shirts to fight. One Bounty Hunter member, "Mike-Mike," was doing all the talking. He said that his "homegirl" from Nickerson Gardens

(Donshay) was going to fight Lakeisha, and that if she did "fight, I'm fightin'." He challenged the West Side Pirus to fight at Enterprise Park. The West Side Pirus were "down with that." Mike-Mike said to Angela, "We spin on girls, too."

The Bounty Hunters and others from Nickerson Gardens got on the bus. The West Side Pirus attempted to leave in their cars, but the police, who had received a call that the West Side Pirus were going to "shoot the graduation up," detained them.

Angela saw defendant on the street near the Golden Bird. Jason Keaton, a West Side Piru, drove his Tahoe out of the Golden Bird parking lot, stopped in front of defendant, and said, "Do you want a ride to the hood?" Defendant said yes and got in the front passenger seat. Keaton made a U-turn and followed in the direction of the bus.

Later that evening, Angela heard that defendant had killed Dovon Harris, whom she knew as Poo-Poo. Still later, Angela was sitting in a car with some friends when defendant arrived. He told them that he had killed Harris. He said that he and Keaton had followed the bus and watched as the people got off. The people from the bus were walking in the alley toward Nickerson Gardens. Keaton and defendant drove down the alley, and defendant believed that he was recognized. They left the alley and came back, driving down the alley slowly, playing the radio in the Tahoe loud. Dovon Harris walked toward the car. Some of the others had their hands on their waistbands as if armed with guns. Believing he was about to be shot, defendant fired first, trying to hit Mike-Mike and another Bounty Hunters gang member known as "Two-Eleven." But Mike-Mike ducked and Harris was struck. Defendant said that "he shot the wrong boy."

Defendant told Angela that he was drunk and high, that Keaton already had the gun in the car, and that Keaton had urged defendant to shoot (declaring,

"Bust"). According to Angela, Keaton needed to "get his stripes up over there at West Side Pirus since he like . . . a nothing . . . over there."

B. *Conversation Between Angela and Defendant*

After questioning Angela, Detective Skaggs brought defendant into the room. He said that Angela had told him that defendant shot Harris. Detective Skaggs said that Angela had "told . . . the truth of what happened that day with you jumpin' into Jason's ride, bustin' a U-turn." Defendant interrupted to ask, "Who's Jason?" After summarizing Angela's statements implicating defendant, Detective Skaggs left defendant and Angela alone in the room.

Defendant said to Angela, "You shouldn't have told 'em." Angela chastised him for pretending not to know who Jason was. Defendant said that he "messed up" and was "[f]acing fuckin' life for you." Angela said that she was on probation and was not "goin' down for whatever . . . your dumb ass did." She said that she had told the truth and was going home. She urged defendant to tell the truth also. As she was leaving the room, defendant told her to "[t]ell everybody outside I love 'em."

C. *Defendant's Interrogation*

The detectives returned, and Detective Skaggs advised defendant of his *Miranda* rights. Defendant agreed to talk to this officer. Under questioning, defendant said that on the afternoon of the shooting, he was at his grandmother's house when he received a telephone call saying that Angela was about to fight "some little project boys." He retrieved his .45 caliber pistol from the back yard and walked to the area around Centennial High School. When he arrived, a group

of his friends was exchanging words with another group across the street at the bus stop. The other group got on the bus and said that they were coming back.

One of defendant's friends, whom he refused to identify, picked him up in his car and drove him to Nickerson Gardens. Defendant did not intend to shoot anyone, and just wanted to see what the other group was going to do.

Defendant saw the group get off the bus, and his friend drove down an alley, playing the radio loud. The group looked at the car and recognized defendant, because he attended school with all of them. They were holding their "belt buckles, hands in [their] shirt[s]," as was another group behind them. Defendant thought that he had to "shoot this one out" because it was "them or us." Defendant "didn't say nothin'" and "just reacted." He had his gun on his lap. He cocked it and put in the clip. Dovon Harris, with whom defendant had played basketball, walked toward the car. Defendant began firing, and saw Harris fall about six feet away. The crowd scattered and hid. Some continued to come toward the car, which defendant believed meant they had guns. Defendant emptied his full clip of 18 to 21 rounds. Defendant could not believe what he had done

After the shooting, defendant gave the gun to a friend to dispose of. He told Angela and her friends about the shooting and told them to stop talking about it. "OG's" told him that he broke "the code," saying that he had done it "wrong" and that the "neighborhood [was] hot." He also heard that people from the projects wanted to kill him.

Defendant denied claiming membership in the West Side Piru gang, but stated that "[a]ll [his] family" did. His uncles told him that they had done enough for the gang, and defendant did not have to wear their colors.

D. *Conversation with the Aunts*

When defendant's interrogation was finished, the detectives allowed defendant to speak alone to Angela and his aunts. In the ensuing exchange, defendant said, among other things, that he had done the shooting "because of" Angela, and that he had fired "[t]o get outta the projects. Either they shoot us or we shoot them."

III. *Additional Evidence*

According to Detective Kenneth Bonner of the Compton Unified School Police Department, in a January 2006 encounter, he asked defendant what gang he was from. Defendant said that he was from West Side Piru and his moniker was "Y.G. Tiny." Similarly, Detective Kouri testified that in small talk after defendant's interrogation, defendant admitted that he was a member of the West Side Piru gang. Detective Kouri also testified that each year around the time of the Centennial High School graduation, members of the Bounty Hunters and West Side Pirus meet at Enterprise Park to fight.

Testifying as a gang expert, Los Angeles County Sheriff's Detective Frederick Morse explained that the West Side Piru gang (a Bloods-affiliated gang) has a rivalry with the Bounty Hunters (a Crips-affiliated gang.). Asked a hypothetical question consistent with the prosecution's version of the killing, he testified that the killing was committed for the benefit of the West Side Piru gang.

Three .45 caliber shell casings were found at the murder scene. All were fired from the same gun. The deformed bullet removed from the body of Dovon Harris was not less than .40 caliber, and a deformed bullet recovered from the scene was within the range of .40 to .45 caliber.

IV. *Defense Evidence*

Defendant testified that after receiving two telephone calls from a West Side Piru member (Travon Allen), the second informing him that Angela was "getting into it" with some boys at Centennial High School, he walked to the school. Defendant denied that he belonged to the West Side Piru gang, and denied telling any police officer he belonged. However, he had family members who were involved in the gang, and, living in the West Side Piru territory, he knew many members of the gang.

Nearing the school, he saw police there and decided he should leave, so he started back to his grandparents' house. As he was walking on Central, his friend, Jason Keaton, pulled up in his tan Tahoe and asked where he was going. Defendant told him he was headed to his grandparents' house. Defendant got in, and they drove south on Central, made some turns, and ended up at Imperial and Central. They did not discuss where they were going, retaliation against the Bounty Hunters, or shooting anyone.

Defendant saw a group of people he knew from school, including Dovon Harris, Ishanitte Jones, Donshay, and two Bounty Hunters gang members, Two-Eleven and Quarterman. Two-Eleven was rumored at school to carry guns. Dovon Harris, with whom defendant was "real cool" at school, and who sometimes played basketball with defendant during lunch, was not a gang member.

Keaton turned into an alley between Central and Imperial and traveled perhaps two to three miles an hour. Defendant's window was about half open. He saw the group from school congregating to his right near a church parking lot, as well as a second group of about 20 people down the block. Both groups looked toward the Tahoe because the music was playing loud.

Keaton stopped his car at the apron of the alley, and suddenly a gun defendant had never seen before "appeared" on his lap – a black "off brand," seven-shot, .45 caliber pistol. Defendant was "shocked."

Defendant saw Two-Eleven and Mike-Mike (another Bounty Hunter Member whom defendant knew from school) walk toward the Tahoe, reaching into their waistbands. Dovon Harris also moved toward the car, but did not reach into his waistband. Keaton told defendant to look at the group, they were about to shoot. Believing he was in danger, and not trying to hit anyone in particular, defendant fired about four shots. Harris was the closest to the car when defendant began firing, but defendant did not see or aim at him when he fired. Defendant did not see anyone with a gun.

Keaton drove off, and defendant heard two gunshots, one of which struck the back window of the Tahoe. As they were driving, Keaton told defendant that he had driven to Nickerson Gardens to see if the other group would return with guns. Defendant gave the gun back to Keaton and never saw it again.

Defendant denied telling his sister and her friends about the shooting, and denied telling them in particular that he was trying to kill Mike-Mike and Two-Eleven. He did not know that Harris died until the next day. He lied to the detectives when he said, among other things, that he retrieved the gun and that it had an extended clip. He was protecting Keaton.

DISCUSSION

I. *Playing the DVD of Angela Washington's Interrogation*

Defendant contends that the trial court erred in admitting portions of Angela Washington's interrogation that were not inconsistent with her trial testimony. We find no prejudicial error.

In her trial testimony, Angela described the confrontation between Donshay and Lakeisha, and the exchange of gang challenges between the Bounty Hunters at the bus stop and the West Side Pirus at the Golden Bird. However, she claimed not to know the Bounty Hunter who told her he would slap and spit on her, and she denied seeing the group from Nickerson Gardens get on the bus. She also denied seeing defendant there, and testified that although she saw Jason Keaton make a U-turn, she did not see him stop. She testified that after the shooting, defendant talked only to her friend Shallana and not to her. He never said that he was involved in the shooting.

When asked if she had told Detective Skaggs that she had seen defendant at Centennial High School, she denied knowing who Detective Skaggs was and claimed not to remember talking to him at all. She testified that she talked to one "bald headed" officer. She denied ever saying that she saw defendant near Centennial High School, and denied telling Detective Skaggs that defendant admitted his role in the killing.

The prosecutor sought to play the entire portion of the DVD containing Angela's interrogation as impeachment. He argued that the entirety of the interrogation was relevant to demonstrate Angela's bias as a witness, the tenor of her statements to the police, and the extent of her evasive testimony in going so far as denying even knowing who Detective Skaggs was. Defense counsel objected under Evidence Code section 352 and on the grounds of hearsay. In particular, defense counsel argued that the portions of Angela's interrogation that were not inconsistent with her trial testimony were inadmissible. The court overruled the objections, reasoning that the entire interview was, in substance, a prior inconsistent statement, because Angela denied speaking to Detective Skaggs at all. Thereafter, the portion of the DVD containing Angela's interrogation was played.

Assuming (without deciding) that the court erred in admitting the entirety of Angela's interrogation, we conclude that there is no reasonable probability that a different result would have been reached. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); see *People v. Harris* (2005) 37 Cal.4th 310, 336 [ordinary evidentiary errors do not implicate federal constitution, and are tested by *Watson* standard].) Defendant argues that prejudice flowed from three topics Angela mentioned. The first is Angela's statements about family members who belonged to the West Side Pirus, the gang's territory, and the gang's rivals. However, these statements were merely duplicative of statements defendant made during his interrogation, his testimony at trial, and the trial testimony of Detectives Skaggs and Morse. They could have had no effect on the verdict.

Second, defendant cites Angela's statement that the police stopped the West Side Piru gang members from leaving the Golden Bird in their cars because "they [were] lookin' for . . . guns. They had a call that it was guns and it was West Side Pirus was up there [and] they was gonna shoot . . . the graduation up." He also cites a related portion of the interview in which she said that before the graduation, there was a rumor that "Jewels" (apparently a West Side Piru) and defendant were "gonna shoot up the graduation."

There is no likelihood that these brief references contributed to the verdict. They are isolated portions of a much longer interrogation. The prosecution did not mention them at trial, and they were clearly overshadowed by the admissible portions of Angela's interrogation, including her description of defendant's confession to her that he shot Dovon Harris.

Moreover, on the entire record, there was compelling evidence that the death of Dovon Harris was the result of an intentional, gang-related shooting perpetrated by defendant in the Nickerson Gardens area. Defendant admitted to Detective

Skaggs, and earlier to Compton Unified School Police Officer Kenneth Bonner, that he belonged to the West Side Piru gang, a gang in which other family members were heavily involved. On the afternoon of the shooting, after receiving a telephone call informing him that his sister was about to fight with members of the Bounty Hunters, defendant walked to Centennial High School, armed with a gun. Jason Keaton, another West Side Piru, picked him up, and they followed the route of the bus on which the Bounty Hunters and others from Nickerson Gardens were riding. After the group got off the bus, Keaton and defendant drove down the alley slowly, and defendant opened fire on the group, after which Keaton sped away. According to Detective Morse, such a shooting would "earn you stripes" in the gang.

As compared to this evidence, defendant's evidence of self defense and unreasonable self defense – his claim that he was not a gang member, that he did not know where Keaton was driving, and that the gun suddenly appeared on his lap as Mike-Mike and Two-Eleven were advancing and reaching into their belts – was extremely weak. We conclude that defendant suffered no prejudice from Angela's reference to the police receiving information about the possibility of a shooting by West Side Pirus at the graduation, or her reference to a rumor that defendant was involved in such a plan.

Finally, defendant cites a portion of Angela's interrogation in which she speculated that Jason Keaton wanted to "get his stripes" in the West Side Pirus. But as we have noted, the evidence of defendant's own gang-related motive was considerable. Thus, even in the absence of the portions of Angela's interrogation

cited by defendant, it is not reasonably probable that a different result would have been reached. (*Watson, supra,* 46 Cal.2d 818.)[3]

II. *Refusal to Instruct on Prior Threats*

The trial court instructed the jury on self-defense and on reducing murder to voluntary manslaughter through unreasonable self-defense, using CALCRIM Nos. 505 and 571, respectively. Each of these instructions contains a proposed paragraph regarding prior threats for use in appropriate cases. The paragraph in the self-defense instruction, CALCRIM No. 505, informs the jury that if defendant knew that the victim "had threatened . . . others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable." Similarly, the unreasonable self-defense instruction informs the jury that it can consider defendant's knowledge of such a threat "[i]n evaluating the defendant's beliefs." (CALCRIM pp. 236, 358.)

At trial, defense counsel requested that the paragraph on prior threats in the self-defense instruction be given. He argued that it was supported by defendant's testimony that Two-Eleven "is known to carry guns" at Centennial High School. The trial court refused, because the cited testimony did not amount to a threat by Two-Eleven.

On appeal, defendant contends that possession of a gun at school constitutes an implied threat, and that the trial court erred in not including the cited paragraphs on threats in both the self-defense and unreasonable self-defense instructions. We disagree.

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[3] For the same reasons, even if we were to apply the standard of *Chapman v. California* (1967) 386 U.S. 18, we would find any error harmless beyond a reasonable doubt.

Regardless of whether possession of a gun at school might be considered an implied threat, the jury instructions were adequate. Under the instructions as given, the jury could properly consider defendant's testimony that Two-Eleven was known to carry guns at school. In the instruction on self defense, the jury was instructed: "When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed." Similarly, in the unreasonable self-defense instruction, the jury was instructed that "[i]n evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant."

Defendant's knowledge that Two-Eleven was known to carry guns at school was relevant only because it tended to support his claim that he feared Two-Eleven might be armed when he reached toward his belt. The instructions quoted above adequately permitted the jury to consider defendant's knowledge of Two-Eleven's reputation in this context. Indeed, these instructions were clearer and simpler on the point than asking the jury to find that Two-Eleven's gun possession at school constituted an implied threat. We find no instructional error.

III. *Instruction on Gang Activity as Relevant to Credibility*

Pursuant to CALCRIM No. 1403, the court instructed the jury on the limited purposes for which evidence of gang activity could be considered. The list included the following: "You may also consider this evidence when you evaluate the credibility or believability of a witness." Defendant contends that this portion

of the instruction improperly permitted the jury to discredit his testimony if it found that he was a gang member. We disagree.

The jury was generally instructed on the credibility of witnesses pursuant to CALCRIM No. 226. In that instruction, the jury was told, among other things, to judge each witness's testimony by the same standard, and that it "may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony." In that context, the jury was entitled to consider the evidence of defendant's gang activity as one factor in evaluating his credibility. Defendant's trial testimony differed in important respects from his pretrial statements to Detectives Skaggs and Kouri, and evidence of defendant's gang involvement was a factor that might help explain why he changed his version of events at trial. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168-1169 [rejecting similar challenge to CALCRIM No. 1403].) For instance, he told Detectives Skaggs and Kouri that "OG's" (according to Detective Morse, an abbreviation for "original gangsters") had criticized him for the shooting, asking why he had done it and saying that he "just did it wrong." Based on this evidence, the jury was entitled to consider whether he changed his version of events so as to ingratiate himself with the "OG's" – for example, by adding the detail at trial that he heard two shots, presumably fired by rival Bounty Hunter gang members, as he and Keaton drove away, and that one bullet passed through the rear window of Keaton's Tahoe.

Further, the challenged instruction did not tell the jury it could disbelieve defendant based solely on a finding that he was a gang member. It merely informed the jury that evidence of defendants' gang activity was one factor that the jury could consider in evaluating the truth of his testimony. In short, there was no error in the instruction.

IV. *Instructions on Self-Defense*

As we have noted, the court instructed the jury on self defense pursuant to CALCRIM No. 505. That instruction informed the jury in part that "[t]he defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the attempted killing was not justified."[4] It also informed the jury that "[a] defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of death or great bodily injury has passed. This is so even if safety could have been achieved by retreating."

Defendant contends that these portions of CALCRIM No. 505 "were contradictory on their face." According to defendant, they allowed the jury to find that if he could have achieved safety by retreating, then he necessarily used more force than was reasonably necessary. He argues that the instruction should have made clear "that a defendant must have 'used no more force than was reasonably necessary' *except that* he was 'not required to retreat but was entitled to stand his ground even if safety could have been achieved by retreating.'" (Italics in original.)

We see no inconsistency in the instruction. It clearly and correctly conveyed the concept that: (1) a defendant may stand his or her ground and defend, and (2) the force used in such defense must be no more than is reasonable under the circumstances. The instruction carries no implication that the decision not to

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[4] We quote from the written instruction in the clerk's transcript. In reading the instruction to the jury, the court referred not to "the attempted killing," but to "the killing." Defendant does not mention the discrepancy, and we attach no significance to it.

retreat if safety can be reached means that any subsequent use of force is unreasonable.

DISPOSITON

The judgment is affirmed.[5]

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.

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[5] Because we have addressed defendant's claims on the merits, we need not address his contention that his trial counsel was ineffective to the extent he failed to preserve any of these claims.